Filed 12/15/09 Marriage of Nelson CA4/2

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| In re the Marriage of JEAN and JIMMIE H. NELSON. | |
| JEAN NELSON,<br><br>Appellant,<br><br>v.<br><br>JIMMIE H. NELSON,<br><br>Respondent. | E046359<br><br>(Super.Ct.No. IND084599)<br><br>OPINION |

APPEAL from the Superior Court of Riverside County. Dale R. Wells, Judge. Reversed.

Parcells Law Firm and Dayton B. Parcells III for Appellant.

Law Offices of Ray B. Bowen, Jr., and Ray B. Bowen, Jr., for Respondent.

Appellant Jean Nelson (wife) appeals from an order of the family law court denying her motion to vacate the judgment, reopen evidence, and award her a 100 percent interest in certain assets. The court also imposed sanctions on wife for bringing the motion to vacate.

Wife failed to file a timely notice of appeal from the judgment itself; the only issue before us is the court's ruling on the postjudgment motion.

Wife's motion identified two grounds upon which to set aside the judgment and to reopen the evidence: First, mandatory relief from a default on an issue arising from trial counsel's mistake, and second, husband's failure to comply with his duty to disclose certain accounts, which remained unadjudicated. The trial court properly denied the motion to vacate as to the first ground, but husband undeniably failed to comply with his duty of disclosure and the judgment had failed to divide the undisclosed assets. Because the trial court retains jurisdiction to divide unadjudicated assets, which are presumptively community property, we construe the second ground of wife's motion not as a motion to vacate the judgment, but as a postjudgment motion to divide the excluded assets. (Fam. Code, § 2550, et seq.)[1] The trial court erred in failing to deal with the excluded assets. In addition, because wife's motion identified a facially meritorious claim—that certain community property assets had not been divided—the order imposing sanction upon her was erroneous. We therefore reverse the trial court's ruling and remand for further proceedings.

## FACTS AND PROCEDURAL HISTORY

Wife met Jimmie H. Nelson (husband) when they worked in the same real estate brokerage. In 1970, husband opened his own real estate brokerage, and wife continued to work for him. At some point, they began living together, and in 1989 they married.

[1] All further statutory references are to the Family Code unless otherwise indicated.

They bought real estate together both before and during the marriage. They maintained some joint accounts to provide for their jointly owned properties, but each also maintained some accounts in his or her own name.

During the premarital phase of the parties' relationship, they purchased some properties in joint title, but others were in the name of one or the other individually. Some of their investment accounts were held in both names, while some were not. Husband's two businesses, the real estate brokerage and a business called Budget Auto Sales, were kept in husband's name only.

As noted, the parties were married in 1989, nearly 20 years after they first met. They separated 14 years later, in 2003.

At trial, wife claimed that several of the real properties and bank accounts were her separate property, that is, that they had agreed that anything held as separate property before the marriage would continue to be that party's separate property. Husband's theory was that, regardless of how title was held, he and wife had had an agreement to pool their assets.

As to the title of the real property holdings, the trial court discredited husband's evidence that he did not know or care how title was held, but assumed that everything was actually jointly owned and the proceeds were to be pooled. The court found that husband "is a real estate agent and broker. His stock in trade is selling title to real estate. He knows the law on title and vesting of title in real estate. His testimony that he entered into an agreement with [wife] in which he didn't care how title was held lacks credibility." The court therefore took account of the form of title of the various parcels of

real property, and confirmed the Carmel Valley property to wife as her separate property, confirmed the Platt Avenue property to wife as her separate property, awarded the community property Calle Palo Fierro property to husband, and the community property Balboa property to wife.

As to the various checking, savings and investment accounts, the court found that their origins and sources had "not been established with any degree of certainty. There is simply no way, given the state of the evidence, for the court to divine the source of the funds invested either prior to, or during marriage. Accordingly, the court finds that the . . . investment, bank and security accounts are community property and orders them divided equally."

The court entered a judgment along the same lines on March 17, 2008. On May 27, 2008, 71 days later, wife filed a motion to vacate the judgment, reopen the evidence and award certain property to her. Wife's motion urged that the judgment should be set aside under Family Code section 2122, subdivisions (a), (b) and (f),[2] for fraud, perjury

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[2] Section 2122 provides in relevant part:

"The grounds and time limits for a motion to set aside a judgment, or any part or parts thereof, are governed by this section and shall be one of the following:

"(a) Actual fraud where the defrauded party was kept in ignorance or in some other manner was fraudulently prevented from fully participating in the proceeding. An action or motion based on fraud shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the fraud.

"(b) Perjury. An action or motion based on perjury in the preliminary or final declaration of disclosure, the waiver of the final declaration of disclosure, or in the current income and expense statement shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the perjury. [¶] . . . [¶]

*[footnote continued on next page]*

and failure to comply with disclosure requirements. That is, wife contended that husband failed to disclose, and concealed, additional financial accounts that remained unadjudicated by the family law judgment. She further argued that the judgment should be set aside under the mandatory provisions of Code of Civil Procedure section 473, subdivision (b). In this respect, she presented her trial attorney's declaration of fault, that he had made a "mistake" in deciding not to present a forensic accounting expert who could have traced the funds into and out of the parties' various bank and investment accounts. Wife had contended at trial that many of the properties and bank accounts were her separate property, which she had owned before marriage, but that the court had adjudicated all to be community property because of the inability to trace the funds.

The trial court denied wife's motion to vacate the judgment and sanctioned her $9,000, payable to husband's counsel.

Wife filed a notice of appeal, purporting to appeal from a "[j]udgment after court trial entered on June 27, 2008," as well as the "[o]rder denying [wife's] Motion to set aside Judgment . . . and [o]rder imposing monetary sanctions of $9,000 against [her]." The June 27 date was the date of the trial court's ruling denying wife's motion to vacate the judgment, not the date of the judgment. This court, by order of September 25, 2008, noted the judgment of March 17, 2008, wife's motion to vacate the judgment, filed May

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"(f) Failure to comply with the disclosure requirements of Chapter 9 (commencing with Section 2100). An action or motion based on failure to comply with the disclosure requirements shall be brought within one year after the date on which the complaining party either discovered, or should have discovered, the failure to comply."

27, 2008, the trial court's denial of the motion to vacate on June 27, 2008, and wife's notice of appeal on July 23, 2008. We ordered that, "[t]he appeal from the denial of the motion to vacate and award of sanctions . . . is timely and may proceed. [¶] However, the appeal from the judgment entered March 17, 2008[,] is untimely, and is DISMISSED." Thus, we only have before us for consideration the trial court's ruling on wife's motion to vacate, and not the judgment itself.

## ANALYSIS

### I. The Motion to Vacate on the Ground of Attorney Mistake Was Properly Denied

Wife's motion to vacate the judgment was premised in part on the mandatory relief provisions of Code of Civil Procedure section 473, subdivision (b): "Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." We review applications of this provision de novo. (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.)

Wife's trial counsel did submit an affidavit of fault, attesting to his "mistake" in deciding not to present any expert testimony regarding accounting for and tracing the various bank and investment accounts to establish wife's claim that several of the

accounts were her separate property. When trial counsel took over representation on the case, he reviewed the files "obtained from previous counsel, [and] understood that Les Kornblatt, a forensic accountant, had performed some tracing and other analysis of [wife's] separate property assets she had owned prior to marriage to [husband]. It was [his] understanding from conversations with Mr. Kornblatt, that [he] had not fully completed his work and had not prepared any report. Over [wife's] objections, I made a tactical trial decision to neither name nor call Mr. Kornblatt as a witness at trial of this matter. I felt that the expense that would be involved in having Mr. Kornblatt complete his analysis, prepare a report, and prepare for and appear at trial, was not justified. I further reasoned that [wife] could testify sufficiently on her own as to the separate property assets she had owned, how she had obtained them, and what had happened to them over the course of the years." Trial counsel "did not anticipate that the Court would find there was a deficiency of evidence presented to support [wife's] claim that the majority of her assets were separate property, or the Court's stated resulting inability to award [wife's] separate [property] liquid assets to her, and instead, to find that . . . all of [wife's] separate property liquid assets were community property." Counsel averred that, "[i]n hindsight, I realize that the tactical trial decision I made to not call Mr. Kornblatt as a witness was a mistaken decision." Counsel therefore requested that the court vacate the judgment and reopen the evidence to permit wife to present expert accounting testimony.

The mandatory relief provisions of Code of Civil Procedure section 473, subdivision (b), expressly apply only where the attorney's mistake, inadvertence, surprise

or neglect results in a default, default judgment, or dismissal akin to a default. (*Pagarigan v. Aetna U.S. Healthcare of California, Inc.* (2007) 158 Cal.App.4th 38, 45.)

Here, trial counsel's "mistake" did not result in a default, default judgment or dismissal, nor did it deprive wife of her day in court on all the issues to be considered. Indeed, counsel's affidavit of fault expressly admits that he knew the proper issues, and he adduced wife's testimony on them. His "mistake" was not actually a "mistake," but instead a rational, purposeful, tactical choice. He knowingly and expressly gave notice that he would not be presenting any expert witnesses at trial. The tactic backfired, but that is not a ground for mandatory relief under Code of Civil Procedure section 473.

Wife's reliance on *Gera v. Gera* (1969) 272 Cal.App.2d 492 (*Gera*) is misplaced. There, the attorney for the wife relied on information conveyed to him by his client; the client was factually mistaken that a joint tenancy deed had not been delivered to the husband and that it had not been recorded. On that basis, the attorney had determined that it would not be in his client's best interest to record a homestead on the property.[3] It

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[3] Wife's opening brief describes *Gera* as a situation in which counsel had "made the tactical decision not to offer evidence of her assertion of her homestead rights in her property because of his mistaken belief that it would be detrimental to her case." This is incorrect. The client mistakenly told the attorney that the joint tenancy deed—which was never intended to convey a present interest, but merely to protect the spouse in case of the client's death—had never been delivered or recorded. On that basis, she claimed the home as her sole and separate property. If the client's mistaken facts had been true, the attorney believed that filing a declaration of homestead would harm her claim to the home as separate property. Thus, no declaration of homestead was made until the court indicated its ruling that the deed had been delivered and recorded, and was thus held in joint tenancy. At that point, the attorney had the client record the homestead declaration. The attorney did not make a "tactical decision" not to proffer existing evidence at trial;

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was later discovered that the deed had been delivered and recorded. The wife's attorney then filed the homestead declaration. Because the homestead declaration arose after the trial, and as a result of discovering the mistake during trial, the wife's homestead rights remained unadjudicated in the dissolution proceedings. The wife's attorney moved to reopen the trial to receive new evidence and for leave to file a supplemental complaint. The Court of Appeal held that the trial court abused its discretion in denying this motion. The attorney had been misled by the client's mistakes of fact, but acted to correct the situation as soon as the mistake was discovered. The attorney had the client file the declaration of homestead to protect her rights, and the homestead rights remained unadjudicated. There had never been a court determination on the issue, as the mistake had deprived the client and the court of that opportunity. (*Gera*, at pp. 496, 497-498.) By contrast here, the purported mistake was simply a tactical choice, which did not deprive wife of a trial on the issues. *Gera* is inapposite.

The trial court did not err in refusing to set aside the judgment and reopen evidence to permit wife to present testimony that her attorney consciously elected not to present at trial.

II. The Court Abused Its Discretion in Refusing to Divide the Unadjudicated Assets

The gist of wife's second claim of error was that she discovered, after trial was completed, that husband had several accounts that he had not disclosed during the

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rather, he could not have offered such evidence because no such declaration of homestead existed at the time of trial. (*Gera*, *supra*, 272 Cal.App.2d at p. 495.)

proceedings. She contended that husband's failure to disclose the accounts constituted fraud, perjury, and violation of his statutory duty of disclosure under section 2100 et seq.

A trial court's exercise of discretion in refusing to set aside a judgment dividing community property under section 2122, is subject to reversal on appeal only if the appellate court finds an abuse of that discretion. (*In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 138.)

Section 2103 requires each party in a dissolution proceeding to file a preliminary disclosure of financial information under section 2104, and a final declaration of disclosure under section 2105. Section 2106 provides that no judgment may be entered as to the parties' property rights without the filing of a final declaration of disclosure, and section 2107 provides remedies for noncompliance. Under section 2107, subdivision (a), a complying party may request a non-complying party to prepare a proper declaration of disclosure. Under section 2107, subdivision (b), if the non-complying party fails to comply with the request to supply a further declaration, the complying party may file a motion to compel, or may seek to prevent the non-complying party from offering evidence on issues which should have been covered in the declaration of disclosure. Section 2107, subdivision (c), provides that the court may impose sanctions on a non-complying party, and section 2107, subdivision (d), provides that "[i]f a court enters a judgment when the parties have failed to comply with all disclosure requirements of this chapter, the court shall set aside the judgment. The failure to comply with the disclosure requirements does not constitute harmless error."

On the strength of these provisions, wife contends that, because husband failed to include certain accounts on his declarations of disclosure, the trial court is obligated to set aside the judgment, and husband's failure to disclose cannot be deemed harmless. In addition, in reliance on section 1101, subdivision (h), wife urges that she should be awarded 100 percent of the undisclosed assets as a sanction for husband's alleged breach of fiduciary duty.[4]

Wife's motion to vacate the judgment claimed that husband had failed to disclose three accounts at Downey Savings and two Prudential accounts. Wife also contended that there must be at least one more undisclosed account, as wife had never seen any account into which husband deposited his Social Security checks or from which he paid his country club dues of nearly $1,000 per month.

Wife pointed to husband's income and expense declaration of May 2007, in which he stated that his assets in cash and deposit accounts was "Nil." Husband's final declaration of disclosure in June 2007 repeated the claim that husband's cash and accounts were "Nil." His schedule of assets attached to the final declaration noted he had savings accounts at "Washington Mutual (several accounts)" and "World Savings (several accounts)" to a value of $16,000. No account numbers or individual balances were specified. Husband also disclosed that he had a "Cash account at Ameritrade" with

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[4] Section 1101, subdivision (h), provides: "Remedies for the breach of the fiduciary duty by one spouse . . . when the breach falls within the ambit of Section 3294 of the Civil Code [punitive damages for oppression, fraud and malice] shall include, but not be limited to, an award to the other spouse of 100 percent, or an amount equal to 100 percent, of any asset undisclosed or transferred in breach of the fiduciary duty."

no other information. In investments, he disclosed the existence of accounts with "Waterhouse/Ameritrade," "Prudential Financial (now FSC?)," and mutual funds with "Aim Charter Fund" (giving the account number) and "Kennedy, Cabot & Co." Husband disclosed retirement funds in a "Putnam IRA Account," a "Putnam Annuity Account," and "FSC IRA." He had other assets with "Hartford Life," and "Putnam Hartford."

Husband responded that two of the Downey Savings accounts were joint accounts of which wife had already had knowledge and on which she was a signatory. One of the accounts belonged to Jim Nelson Realty, the parties' real estate business, and one to Budget Auto, another business. After the parties separated in 2003, husband closed one of the accounts so wife would not have access to it, and opened another Downey Savings account to replace it. Husband averred that the two Prudential accounts were old life insurance policies that had been mortgaged to the entire extent of their equity. Husband's response papers attached several checks wife had written on the real estate business account in 2000. In addition, he pointed out that wife's own schedule of assets, included in her preliminary declaration of disclosure, had listed both Downey Savings accounts in June 2005. Husband's trial brief in July 2007 had included a property declaration listing both Downey Savings accounts, identifying them as the business accounts for the real estate business and the Budget Auto business, with stated values for each. Husband attached photocopies of checks showing that wife had written some checks on the Budget Auto account with Downey Savings in 2001.

Wife filed a reply declaration stating that she had never been a signatory on, and had not been aware of, the third Downey Savings account, which husband had explained

was a replacement for one of the joint accounts. She averred that, after the date of separation in 2003, she had not had any access to the accounts or records and, in 2005, she had been restrained from entering the former family home where she had kept her records. She did not know about and did not assume that she had been retained on any business bank accounts. She may have written checks several years earlier, but had no knowledge of the Downey Savings accounts' continued existence. Husband had never disclosed the replacement account at Downey Savings. As to the Prudential account, wife believed it was an investment account, and not a life insurance policy. Finally, wife insisted that there must be at least one additional undisclosed account, because no records from any of the accounts showed where husband deposited his Social Security checks or any payments of his monthly country club dues.

The trial court noted that, "[w]e had a lengthy trial on this. I believe the evidence was presented capably by both counsel[. N]otwithstanding [attorney] Camp's declaration[,] I don't believe a tactical decision if it backfires, gives rise to a 473(b), and I'm denying the motion. [¶] [Wife] had plenty of time to file an appeal[. T]o the extent that there may have been assets that were not disclosed, they can certainly be disposed of with a [m]otion [to] deal with unadjudicated assets, but I'm denying the motion." The court ordered wife to pay $9,000 in sanctions to compensate husband's attorney for having to respond.

As the court plainly recognized, wife's motion identified assets, which were presumptively community property, which had not been disposed of by the judgment. Regardless of whether wife herself had listed some of the assets in her own declaration of

disclosure, husband owed an affirmative duty to disclose *all* the assets of which he had knowledge. Section 2107, subdivision (d), expressly states that the failure to comply with the disclosure requirements cannot be deemed harmless error.

We are aware of *In re Marriage of Steiner and Hosseini* (2004) 117 Cal.App.4th 519, which holds that, despite the statutory provisions, the failure of a spouse to comply with the disclosure provisions is, standing alone, insufficient to require reversal of a judgment. The Court of Appeal held, rather, that "before section 2107, subdivision (d) can be the basis of reversal on appeal or a ground to *compel* the granting of a new trial, a noncomplying litigant must identify some portion of the judgment materially affected by the nondisclosure." (*Id*. at p. 528.) That is, article VI, section 13 of the California Constitution requires that "[n]o judgment shall be set aside, or new trial granted, . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." The constitutional provision "trumps any conflicting provision of the Family Code." (*In re Marriage of Steiner and Hosseini*, at p. 527.)

Here, however, wife has affirmatively demonstrated prejudice and a miscarriage of justice resulting from the failure of disclosure: presumptively marital assets remain unadjudicated in the judgment.

Because husband admittedly failed to comply with his duty of full disclosure, and because wife has demonstrated that presumptively community property assets were not divided by the court, the omitted assets were properly subject to a postjudgment motion for division. (§ 2556.) The statutory scheme expressly states that the court has

continuing jurisdiction over such omitted property. (*Ibid*.) The issue was squarely presented by wife's postjudgment motion; the trial court abused its discretion in refusing to divide the admittedly unadjudicated property.

Because wife's motion clearly identified a proper, non-frivolous issue, the trial court also abused its discretion in imposing sanctions.

DISPOSITION

The trial court's ruling denying wife's posttrial motion is reversed, and the order imposing sanctions is also reversed. The matter is remanded with directions to treat wife's motion as a postjudgment motion to divide omitted assets, as to which the court has continuing jurisdiction. (See § 2556.)

In the interests of justice, each party is to bear its own costs on appeal.

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/s/ McKINSTER
J.

We concur:

/s/ RAMIREZ
P. J.

/s/ KING
J.